80-1907

No.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MADALYN MURRAY O'HAIR
and
JON G. MURRAY,
.....Petitioners,

v.

LEE COOKE, RICHARD GOODMAN, BETTY HIMMELBLAU, CAROLE McCLELLAN, RON MULLEN, JIMMY SNELL and JOHN TREVINO,
..... Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 1st, 1981

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QUESTIONS PRESENTED

1. Whether the custom and practice of having an invocational prayer at the opening of the meetings of the Austin City Council

[1] has a clearly secular purpose;

[2] has a primary effect which neither advances nor inhibits religion; and

[3] avoids excessive entanglement of government and religion?

2. Whether the stated purpose of the prayers, as a "gavel" to bring the meeting to order (a sacrilegious exercise), is the use of a religious vehicle to achieve a secular end and as such is offensive to the prescription of the establishment clause of the First Amendment?

3. Does the enforced recitation of an 11-word state composed prayer by the clerk of the court and the participation in the prayer by the sitting judges of that court at the daily opening sessions of the United States Fifth Circuit Court of Appeals, in New Orleans, Louisiana

[1] have a clearly secular purpose;

[2] neither advance or inhibit religion;

[3] entangle the judicial branch of the federal government with religion excessively?

4. Does a court order directing Atheists to leave the courtroom

if they cannot accept the unconstitutional practice of prayer in a federal district court show bias of that court for religion and against Atheism thereby depriving the petitioners, who are Atheists, of an impartial trial?

5. When the court, before which complaint of opening prayers at government sessions, itself opens with a prayer, which is that of which the Petitioners complain, are the Petitioners deprived of the neutrality required of the judiciary?

THE PARTIES

The parties to this proceeding are as listed in the caption of this case, except that the present Attorney General of Texas is Mark White.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No._____

MADALYN MURRAY O'HAIR
and
JON MURRAY
..... Petitioners

v.

LEE COOKE, RICHARD GOODMAN, BETTY HIMMELBLAU
CAROLE McCLELLAN, RON MULLEN, JIMMY SNELL
and JOHN TREVINO,
.....Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners, Madalyn Murray O'Hair and Jon Murray ask that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered February 2, 1981, affirming an order of the United States District Court for the Western District of Texas.

OPINIONS BELOW

The judgment and opinion of the United States District Court, Western District of Texas, Austin Division is not reported. (See Appendix, p. 2a) The judgment and opinion of the Court of Appeals is reported in *638 F.2d, No. 2, 1231,* in *"Decisions without Published Opinions."* (See Appendix, p.).

JURISDICTION

The jurisdiction of this Court is invoked on the grounds that the United States Court of Appeals for the Fifth Circuit has decided a federal question of establishment of religion in conflict with applicable legal standards derived in decisions of this Court, or has sanctioned a departure from such standards and decisions by a lower court, so as to call for an exercise of this Court's power of supervision.

The judgment of the Court of Appeals is dated and was entered February 2, 1981. Jurisdiction of this Court is timely and invoked under *28 U.S.C.A. sec. 2101 (c)* and *28 U.S.C.A. sec. 1254 (1)* in light of *Rule 19* of the *Rules of the Supreme Court of the United States.*

CONSTITUTIONAL PROVISIONS INVOLVED

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, . . .

FOURTEENTH AMENDMENT

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Plaintiffs filed a complaint for injunctive, declaratory and monetary relief in the United States District Court for the Western District of Texas on December 13, 1977. They also sought costs and, pursuant to *42 U.S.C. sec. 1988,* attorney's fees. That complaint was superseded by an amended complaint filed November 28, 1979. The amended complaint dropped the demand for monetary relief.

In order to obtain a *Statement of Facts* from a delaying and a reluctant Defendant counsel, it was necessary to agree to *Fact 17.* which states "No person is required to stand or be present during the invocation and every person present is completely free to leave before and during the invocation." However, the Court may take judicial notice that when Dr. Madalyn Murray O'Hair refused to participate in the prayer and refused to leave the room she was arrested on November 3rd, 1977 under *Sec. 42.05, Texas Penal Code,* for the criminal misdemeanor of "disrupting a public meeting." *Cause No. 168 020* pending in County Court of Law No. 1, Travis County, Texas.

The amended complaint alleged that Defendants incorporated a religious invocation in their officially conducted business, that they did this under color of legal authority, that the practice would continue, and that it constituted an establishment of religion prohibited by the First Amendment to the Constitution of the United States.

Defendants did not answer the amended complaint. Their answer to the initial complaint admitted jurisdiction under

28 U.S.C. Sec. 1343, admitted the existence of the challenged practice and denied the legal conclusions drawn by the Plaintiffs. As affirmative defenses, they alleged that they had acted in good faith and on advice of counsel.

Both parties moved for summary judgment. The District Court denied Plaintiffs' motion, granted Defendants' motion, and directed entry of judgment on January 29, 1980. Plaintiffs filed a notice of appeal on January 31, 1980. The case was heard in oral argument by the United States Fifth Circuit Court of Appeals, New Orleans, Louisiana, on 28th January, 1981. On 2nd February, 1981 that court affirmed the United States District Court, Western District of Texas.

SUMMARY OF ARGUMENT

The Supreme Court has developed a tripartite test to determine if a practice violates the Establishment Clause of the First Amendment. A statute or practice must reflect a "clearly secular" purpose, E*pperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L.Ed.2d (1968);* have a primary effect which neither advances nor inhibits religion, *McGowan v. Maryland 366 U.S. 420, 81 S. Ct. 1101, 6 L.Ed.2d 393 (1961); School District of Abington Township v. Schempp,* and *Murray v. Curlett, 374 S. 203, 83 S. Ct. 1560, 10 L.Ed. 2d 844 (1963)*; and must avoid excessive governmental entanglement with religion. *Walz v. Tax Comm'n., 397 U.S. 664, 90 S. Ct. 1409, 25 L.Ed.2d 697 (1970). See Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1975), Tilton v. Richardson, 403 U.S. 672,*

(1 S. Ct. 2091, 29 L.Ed.2d 790 (1971) and *Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 Ed.2d 948 (1973).*

Plaintiffs argue that the challenged practice satisfies none of these tests. They hold that the practice of commencing public legislative meetings and bodies with a religious prayerful invocation delivered by a clergyman, accommodated administratively by the government officials, has no "clearly secular" purpose and that the purpose alleged of such prayer being a "gavel" to quiet the meeting could be performed by a gavel so that the use of a religious instrumentality is both sacrilegious and unconstitutional, that the primary effect of any public, state endorsed, prayer to god is to put the power and prestige of the state behind the exercise and thus to advance religion and that, because it is unnecessary to use religion or prayer to satisfy the alleged purpose put forward by the state, excessively entangles government and religion.

REASONS FOR GRANTING THE WRIT

The District Court was required to analyze a claim of Establishment Clause violation by application of the tripartite test established by the Supreme Court, supra.

Judge Roberts recognized and applied this test. He also recognized, correctly, that a practice is unconstitutional if it does not satisfy any of these tests. However, he adopted the rationale of the Court of Appeals for the Eighth Circuit in *Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979)* and held that the practice in dispute violated none of the tripartite standards.

Let us make a reasonable application of the standards instead of an emotional subjective one. Prayer is supplication to a god. It is impossible for prayer to have a "clearly secular" purpose in any content. However, the *Bogen* Court found a "secular" purpose for the prayer – that it was a gavel which served to bring a room to order. This is the use of a religious instrumentality, prayer, to obtain a secular end which could be obtained by an ordinary gavel. Indeed, if the members of the council acted with dignity, decorum and courtesy as they entered the council chamber, there would be no need for any "quieting" exercise. When the judges of the United States Supreme Court enter the courtroom, all those present cease conversation and rise in respect. No prayer is needed. If, on the other hand, the persons entering a room where a legislative, executive or judicial function is about to begin, do not act with dignity, decorum and courtesy, no invocation, or gavel, will help.

If prayer has a by-product of bringing solemnity or quiet to

a gathering, this is not its inherent and primary purpose.

Accepting wholely the flat fiat of Bogen that the use of a prayer as a gavel gives prayer and the exercise of praying a "clearly secular" purpose, the District Court in the case at bar went no further in analysis, but accepted that such prayer would not have a primary effect of advancing religion. Yet, there is a plethora of cases which enjoin nondenominational religious practices because of "prayer" involved. These span from the *Engel v. Vitale, 370 U.S. 421 (1962)* decision through *Mangold v. Albert Gallatin Area School District, 437 F.2d 1194 (3d Cir. 1971), DeSpain v. DeKalb County Community School District, 384 F.2d 836 (7th Cir. 1967), cert. den. 390 U. S. 906 (1968), Commissioner of Education v. Leyden School Committee, 358 Mass. 766, 267 N.E. 2d 266, cert. den. 404 U.S. 849 (1971), Nicholson v. Alabama State Bar Assn. Board of Commissioners, 338 F. Supp. 48, (M.D. Ala. 1972), Brown v. Dade Christian Schools, Inc., supra, at 317 (Goldberg, J. specially concurring), Lynch v. Indiana State University Board of Trustees, 378 N.E. 2d 900 (1978) cert. den. 441 U.S. 946 (1979).*

Plaintiffs are Atheists. As such they do not believe nor can they accept the concept of an existence of a deity. They abhor and reject prayer. Yet, the government which is committed to the protection of the minority – even of one – is here found insulting and besmirching their life *weltanschuaung* by government endorsement and sponsorship of prayer.

As indicated in *Engel v. Vitale,* at *p. 430-1,* "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance . . . is voluntary can serve to free it from the limitations of the Establishment Clause . . . The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. . . . When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

The District Court also found no "entanglement" of government and religion, yet when Dr. O'Hair refused to participate in the prayer and also refused to leave the City Council room, she was arrested. Not alone the potential for divisiveness in the community, but the actuality of it, were demonstrated in that arrest, *supra.**

To cater to the majoritarian religious precepts for political advancement demeans the laws of justice. Majoritarian rule does not apply to First Amendment rights. *West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).*

For the foregoing reasons this Court should grant certiorari, and reverse.

* *State of Texas v. O'Hair, Cause No. 16802 pending in County Court of Law, No. 1, Austin, Travis County, TX.*

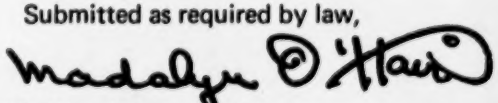
Prayers at the opening session of the judiciary, the United States Court of Appeals, Fifth Circuit, are so patently unconstitutional as to need no other cite than *Engel v. Vitale, 370 U.S. 421 (1962)* which lays down the rule ". . . we think that the constitutional prohibition against laws respecting an establishment of religion *must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government."* at *p. 425*

A Writ of Mandamus should issue axiomatically to the United States Court of Appeal, Fifth Circuit, New Orleans, ordering a cessation of the prayer.

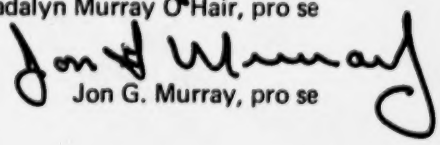
CONCLUSION

For these reasons the Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, which affirms the decision of the District Court of Appeals for the Western District of Texas, Austin Division.

Submitted as required by law,



Madalyn Murray O'Hair, pro se



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Appendix A.

UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF TEXAS – AUSTIN DIVISION

O'HAIR v. COOKE A-77--CA-236

ORDER
(Filed January 29, 1980)

Came on this day for consideration by the Court Cross Motions for Summary Judgment by Plaintiffs and Defendants, pursuant to Rule 56, Federal Rules of Civil Procedure. After careful consideration of the pleadings, the stipulated facts, and the briefs presented by the parties, the Court is of the opinion that there are no material facts in dispute and that Defendants are entitled to judgment as a matter of law.

This is an action by Plaintiffs challenging the constitutionality of the custom and practice of the City Council of Austin, Texas, of having a religious prayer ceremony or invocation given at the opening of the City Council meetings. Plaintiffs seek to enjoin the custom and practice, which they contend violates the First Amendment's prohibition against the "establishment of religion" by the state. The facts upon which Plaintiffs' contentions are based have been agreed to and stipulated by the parties, and are as follows:

1. The Plaintiffs are citizens, residents, and taxpayers of Austin, Travis County, Texas.

2. The Defendants are the publicly elected Mayor and members of the City Council of Austin, Travis County, Texas.

3. The Defendants engage in the custom and practice of having an invocation given at the beginning of most, but not all, of the regularly scheduled meetings of the City Council of the City of Austin.

4. At the meetings at which no invocation is given, the Mayor calls the meetings to order and the Council then proceeds with its business.

5. The regularly scheduled meetings of the Austin City Council are held in the Council Chambers which are located in the City of Austin's Municipal Annex, a building owned and maintained by the City of Austin.

6. The custom and practice of having an invocation at the beginning of most regularly scheduled meetings of the City Council of the City of Austin are not required or provided for in any

ordinance, resolution or motion adopted by Defendants or any other City Council of the City of Austin.

7. The City of Austin, at public expense, prepares written agenda for all City Council meetings. Typically, the giving of an invocation will appear at the beginning of a meeting's written agenda in one of the following ways:

INVOCATION
or
INVOCATION – REVEREND HENRY E. BESEDA,
AUSTIN BRETHREN CHURCH

A written agenda typically consists of six to ten letter-sized pages.

8. The City of Austin, at public expense, prepares written minutes of regular meetings of the City Council. Typically, if an invocation is delivered at a Council meeting the minutes will so indicate in the following manner:

INVOCATION
The invocation was delivered by
Reverend John Towery,
Congregational Church of Austin

A set of written minutes typically consists of twenty to forty-five letter-sized pages.

9. Although the text of an invocation does not appear on the agenda of meetings or in the minutes of meetings, all Council meetings are taped and, therefore, the full text of the invocation appears on these tapes which are stored in the office of Austin's City Clerk. The tape of a typical City Council meeting is six to twelve hours long.

10. The invocations delivered at the beginning of City Council meetings are not given by, selected by, prepared or written by, reviewed by, edited by, or typed by Defendants or any other City of Austin employee or official.

12. Currently the predominate practice followed in obtaining a person to deliver the invocation is that the Austin Council of Churches notifies the City of a local clergyman who will be available.

13. There are no restrictions on who can deliver an invocation and no person has been refused the opportunity to deliver the invocation at a City Council meeting.

14. Defendants have not received any requests from Hindus, Buddhists, Muhammadans, members of the Church of Scientology, or Atheists to present an invocation or ceremony at the beginning of City Council meetings. During the term of the current mayor there have not been any express invitations to give the invocation or ceremony extended to any of the above-mentioned groups.

15. Persons giving the invocation receive no compensation of any kind whatsoever from Defendants, the City of Austin, or the City's employees or officials.

16. Typically, the invocation is announced by the Mayor in the following fashion:

"The invocation will be delivered by John Doe."

at which time City Council members and most of those persons present stand for the invocation. There is no request made for those present to stand or to do anything else.

17. No person is required to stand or be present during the invocation and every person present is completely free to leave before or during the invocation.

18. The custom and practice of having an invocation at the beginning of City Council meetings has been followed for many years in Austin, Texas, and Defendants intend to continue this custom and practice.

19. Invocations given at the beginning of City Council meetings are typically addressed to a Supreme Being.

20. The invocations given at the beginning of City Council meetings are directed toward establishing a solemn atmosphere and serious tone for the City Council meetings.

The only contested issue of law in this case – and the issue upon which the outcome depends – is whether the custom and practice of having an invocation at the opening of meetings of the Austin City Council violates the "establishment of religion" clause of the First Amendment, which is applicable to the states by virtue of the Fourteenth Amendment to the United States Constitution. The Supreme Court has set forth a tripartite test for determining whether a state law or governmental practice or custom steers clear of an establishment of religion. As stated in *Committee for Public Education v. Nyquist, 413 U.S. 756, (1973),* the official actions

While, to this Court's knowledge, neither the Supreme Court nor the Court of Appeals for the Fifth Circuit has addressed directly the establishment-of-religion implications of prayerful invocations at city council meetings, such have been considered and addressed by the United States Court of Appeals for the Eighth Circuit in *Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979).* In that case, involving stipulated facts virtually identical to the facts presented here, the Court upheld the practice of giving invocations at meetings of the Board of Commissioners of St. Louis County, Minnesota. Applying the three-pronged test articulated in *Nyquist, supra,* the Court in *Bogen* held that the invocational prayers delivered by local clergymen had a clearly secular purpose and primary effect:

> "The challenged invocation practice reflects a clearly secular purpose. It is directed toward establishing a solemn atmosphere and serious tone for the board meetings. There is certainly nothing sinister in that purpose. Nor can we say that a prayer will not advance that goal.
>
> "It is also essential that there will be a primary effect of the activity that neither advances nor inhibits religion. It is no doubt true that some who hear the prayers will treat those moments as ones of religious reflection and thought. However, we are satisfied that a primary effect of this activity will simply be the accomplishment of the board's purpose of establishing order and a solemn tone for the meeting. Without meaning to appear cynical, we suggest that establishing solemnity is the primary effect of all invocations at gatherings of persons with differing views on religion."

With respect to the third prong of the *Nyquist* test, the *Bogen* Court noted that the determination of whether governmental activity constitutes "excessive entanglement with religion" often turns on the potential for political divisiveness stemming from the activity. See *Lemon v. Kurtzman, 403 U.S. 602 (1971).* The Court said that the litigation over the invocations in itself demonstrated the political divisiveness of the practice, but that it was not enough to show excessive entanglement:

> "We appreciate the convictions of those who feel that the prayers may impinge on their rights. The use of a public facility for a religious practice, the potential sectarian influence

on public issues, and the stamp of apparent approval given to the religious groups represented, all are matters of legitimate concern to some citizens. However, we do not see this divisive potential as being of the same caliber as the annual appropriation of public funds anticipated but forbidden in *Lemon v. Kurtzman.*"

598 F.2d at 1114.

This Court is aware of cases involving other spheres of governmental activity with religious overtones in which courts have held that the *Nyquist* criteria have not been met. The Court is of the opinion, however, that the decision in *Bogen v. Doty* presents an acceptable balancing of the interest at issue with respect to invocations at meetings of governmental bodies. Thus, the Court will direct entry of judgment for Defendants in this case. Nonetheless, the Defendants should not take too lightly Plaintiffs' contentions. As the Court admonished in *Bogen v. Doty, supra:*

"We would be less than candid if we did not warn the county of the quagmire it is near. . . . We have no reason to believe that persons of any religious persuasions have volunteered [to deliver invocations] and been turned down by the board. If in the future this should occur the board will be in a very difficult position to defend against any allegation that it is excessively entangled in religion by giving public approval to some groups while denying it to others. We will not speculate on what, if any, criteria the county might permissibly use in selecting speakers; we only suggest that the process might prove more burdensome in time and money than is justified by the benefits."

598 F.2d at 1114.

The Court being satisfied that Defendants' practice as set forth in the stipulated facts in this case is not a practice "respecting an establishment of religion," it is accordingly

ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for Summary Judgement be, and hereby is, DENIED; that Defendants' Motion for Summary Judgment be, and hereby is, GRANTED; and that judgment be entered for Defendants

in this cause.

Entered this 29th day of January, 1980, at Austin, Texas.

/s/ Jack Roberts
JACK ROBERTS
CHIEF UNITED STATES DISTRICT JUDGE

Appendix B.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Unit A

O'HAIR v. COOKE No. 80-1142

Appeal from the United States District Court
for the Western District of Texas

February 2, 1981

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and Hunter*, District Judge.

PER CURIAM:

DO NOT PUBLISH

Affirmed. See Local Rule 21.

AFFIRMED

*District Judge of the Western District of Louisiana, sitting by designation.

Local Rule 21: see N. L. R. B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

Appendix C.

ORDER
[in the case of O'HAIR v. HILL, No. 79-1397]
dated: July 7, 1980

Having been offended by (when they first encountered) the prayer in the United States Court of Appeals for the Fifth Circuit on June 5, 1980 in the case of *Hunter v. D.I.S.D., No. 78-3648,* Petitioners asked for a ruling on the possible discontinuance of the prayer for a case set for oral argument on July 16th, *O'Hair v. Hill, No. 79-1397.* On July 7th, 1980, they were advised, by telephone, by Barry Stiebing, Deputy Clark, that Charles Clark, Presiding Judge in that case, had issued an internal memorandum on the request to wit:

"Unless ordered to do otherwise the Court will be opened with prayer on July 16, 1980 precisely as it always has been.

"Ms. (sic) O'Hair may remove herself from the courtroom during the opening announcement.

Signed, Charles Clark."

This matter was brought to the attention of the United States Supreme Court by application for temporary injunction, dated July 10, 1980.

When the case at bar was set for 29th January, 1981, together with the case of *O'Hair v. Clements, No. 80-1159* in the United States Court of Appeals for the Fifth Circuit set for 28th January, 1981, a second request was made of the court and again the Petitioners were notified that the prayer would continue and that they could leave the court room during the prayer. Subsequently, a Motion to Terminate Opening Prayer was filed in both cases on January 17th, 1981.

Appendix D.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

MOTION TO HAVE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, NEW ORLEANS, LOUISIANA, DISCONTINUE THE PRACTICE OF OPENING THE COURT SESSIONS WITH A PRAYER

OR

ALTERNATELY REQUESTING THOSE JUSTICES WHO PARTICIPATE IN PRAYER TO RECUSE THEMSELVES FROM THE HEARINGS ASSOCIATED WITH AMERICAN A-

THEISTS IN THE ABOVE INDICATED AND STYLED CASES ON JANUARY 28TH, JANUARY 29th, 1981 RESPECTFULLY.

To each and every and to all of the Justices of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana, being Chief Justice John R. Brown, Senior Circuit Justices Richard T. Rives, Albert P. Tuttle, Warren L. Jones, John Minor Wisdom, Walter Tettus Gewin, Homer Thornberry, David W. Dyer, Bryan Simpson, Lewis R. Morgan, Joe McDonald Ingraham, and Circuit Justices James P. Coleman, Irving L. Goldberg, Robert A. Ainsworth, John C. Godbold, Charles Clark, Paul H. Roney, Thomas Gibbs Gee, Gerald Bard Tjoflat, James C. Hill, Peter T. Fay, Alvin B. Rubin, Robert F. Vance, Phyllis A. Kravitch, Frank M. Johnson, Jr., Renaldo G. Garza, Albert J. Henderson Jr., Thomas M. Reavley, Henry Politz, Joseph W. Hatchett, R. Lanier Anderson III and Carolyn Deneen Randall.

Applicants Dr. Madalyn Murray O'Hair and Jon Murray herewith move that the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana, discontinue the court's practice of opening the court sessions with a prayer.

Applicants seek to preserve at least the appearance of neutrality of the Court in respect to the First Amendment to the Constitution of the United States and the Establishment Clause thereof and to preserve the jurisdication of the Court and keep it free from error which may taint the judgments which it issues.

Applicants especially seek a discontinuance of such prayer for the opening sessions on January 28th and January 29th, 1981 when the above indicated and styled cases respecting the rights of American Atheists will be subjects of oral agrument before the court.

The case of *O'Hair v. Cooke, No. 80 -1142* involves the offering of prayer at the opening of the City Council of Austin, Texas. Since the United States Court of Appeals for the Fifth Circuit itself opens with a prayer it repeats the offense of which the Appellants complain and cannot offer the appearance of neutrality which is required of a governmental, particularly a judiciary, body.

The case of *O'Hair v. Clements, No. 80-1159* involves the display of a creche of Christian nature and the Menorrah of the

Jewish faith in the rotunda of the capitol building in Austin, Texas. Since the Appellants are Atheists, an appearance before a judiciary which demonstrates its antipathy to Atheism by its engagement in a recognition of a god; and an offer of prayer to him (her, it) deprives the Appellants of an impartial tribunal, in derogation to the First, and Fourteenth Amendments to the Constitution of the United States.

Applicants Madalyn Murray O'Hair and Jon G. Murrary are, and will continue to be litigants in cases involving the civil libertarian rights of American Atheists and will, therefore, on many occasions be, and have been, before the United States Court of Appeals for the Fifth Circuit since the national base of this group, American Atheists, is in Austin, Texas.

Applicants Madalyn Murray O'Hair and Jon G. Murrary are, and will continue to be litigants in cases involving the civil libertarian rights of American Atheists and will, therefore, on many occasions be, and have been, before the United States Court of Appeals for the Fifth Circuit since the national base of this group, American Atheists, is in Austin, Texas.

Applicants are Madalyn Murray O'Hair, an internationally known Atheist leader and Jon G. Murray, Director of the American Atheist Center of Austin, Texas.

All of which indicates that prayers in the United States Court of Appeals for the Fifth Circuit will continue to be the subject of friction and appeal as relief from the oppression of government composed and endorsed prayers is sought by Applicants of this Motion.

The grounds for this Motion are set out with more specifity in the accompanying Affidavit and Memorandum of Law. Wherefore, the Applicants of this Motion ask that the Motion be granted and the prayers struck.

Alternately, it is asked that those justices who participate in opening prayer recuse themselves for bias as is more fully set out in the accompanying Memorandum of Law.

Submitted by
Madalyn Murray O'Hair, pro se
Jon G. Murray, pro se

An accompanying Affidavit set out the nature of the prayer invovled to be an 11- word prayer composed (apparently) by the court being "Oyez, Oyez. God save our nation and this honorable court. Amen."

The Motion was denied in open court on January 28, 1981

and again on January 29, 1981.

This matter was brought, again, to the attention of the United States Supreme Court by application for temporary injunction, in both of the above indicated and styled cases, dated January 18, 1981.

PROOF OF SERVICE

We, Madalyn O'Hair, *pro se*, and John G. Murray, *pro se*, hereby certify that on the 2nd day of May, 1981, we served copies of the foregoing Petition for Writ of Certiorari on the state of Texas and the Solicitor General of the United States and the United States Department of Justice by mailing a copy in a duly addressed envelope, with postage prepaid to:

Travis County Attorney, Travis County Courthouse, Austin, Texas, 78701, Attorney for the State of Texas, to The Solicitor General, Department of Justice, Washington, D. C. 20025 to the U. S. Department of Justice, Civil Division 10th and Constitution Avenues, Washington, D. C. 20530 and to the Clerk, U.S. Court of Appeals, Fifth Circuit, 600 Camp St., Room 102, New Orleans, Louisiana 70130.

Madalyn O'Hair

Madalyn Murray O'Hair, *pro se*

Jon G. Murray, *pro se*

c/o The American Atheist Center
2210 Hancock Drive, Austin, TX 78756
[mailing address: P. O. Box 2117 Austin, TX 78768]
[512] 458-1244

[Revised and reprinted Petition for Writ of Certiorari served by certified mail under date of May 14th to all counsels of record listed above.]

Office-Supreme Court, U.S.
FILED
JUN 15 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1907

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MADALYN MURRAY O'HAIR
AND JON G. MURRAY
Petitioners

V.

LEE COCKE, RICHARD GOODMAN, BETTY HIMMELBLAU, CAROLE McCLELLAN, RON MULLEN, JIMMY SNELL and JOHN TREVINO,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Jerry L. Harris
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Austin, Texas 78767
(512)-477-6511, Ext. 2270
Attorney for Respondents

JUNE 12, 1981

QUESTION PRESENTED

Whether the custom and practice of the City Council of the City of Austin, Texas, of having an invocation at the beginning of City Council meetings violates the establishment clause of the First Amendment.

LIST OF PARTIES

Petitioners are: Madalyn Murray O'Hair and Jon G. Murray.

Respondents are: Lee Cooke, Richard Goodman, Betty Himmelblau, Carole McClellan, Ron Mullen, Jimmy Snell, and John Trevino.

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FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Jurisdictional Statement

The Petition for a writ of certiorari on pages i-ii thereof alleges five points of error under the subject heading "Questions Presented." This Court does not have jurisdiction to consider the alleged fourth point of error because it was never raised or alleged in any court below. *Hiawassee River Power Co. v. Carolina Tennessee Power Co.*, 252 U.S. 341 (1920). With respect to the third and fifth "Questions Presented", which attack the custom of the United States Court of Appeals for the Fifth Circuit of having a brief ceremonious prayer directly after the Judges enter the Courtroom, the issue was decided adversely to

Petitioners upon ex parte motions presented by Petitioners to this Court and to the United States Court of Appeals. Respondents were never delivered copies of such motions, were never asked to brief the question, and were never asked to respond thereto by this Court, the Court of Appeals, or by Petitioners. Therefore, Respondents urge that "Questions Presented" three and five as set forth in Petitioners' applications for a writ of certiorari are not properly a part of Respondents' case.

Statement of the Case

Petitioners, Madalyn Murray O'Hair and Jon Murray, brought suit against Respondents, members of the City Council of Austin, Texas, challenging the custom and practice of having an invocation at the beginning of City Council meetings. Petitioners and Respondents by stipulation agreed to all material facts. Pursuant to Rule 56, Federal Rules of Civil Procedure, Cross Motions for summary judgment together with briefs were submitted. The United States District Court for the Western District of Texas held that the challenged invocation practice did not violate the establishment clause. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court.

A copy of the District Court's ORDER appears in the Appendix of Petitioners' Petition For A Writ Of Certiorari. However, due to some error, this copy of the District Court's ORDER omits the tenth fact stipulation and misnumbers the eleventh stipulation as the tenth. The stipulations correctly appear in the District Court's Order of January 29, 1980, as follows:

1. The Plaintiffs are citizens, residents, and taxpayers of Austin, Travis County, Texas.

2. The Defendants are the publicly elected Mayor and members of the City Council of Austin, Travis County, Texas.

3. The Defendants engage in the custom and prac-

tice of having an invocation given at the beginning of most, but not all, of the regularly scheduled meetings of the City Council of the City of Austin.

4. At the meetings at which no invocation is given, the Mayor calls the meeting to order and the Council then proceeds with its business.

5. The regularly scheduled meetings of the Austin City Council are held in the Council Chambers which are located in the City of Austin's Municipal Annex, a building owned and maintained by the City of Austin.

6. The custom and practice of having an invocation at the beginning of most regularly scheduled meetings of the City Council of the City of Austin are not required or provided for in any ordinance, resolution or motion adopted by Defendants or any other City Council of the City of Austin.

7. The City of Austin, at public expense, prepares written agenda for all City Council meetings. Typically, the giving of an invocation will appear at the beginning of a meeting's written agenda in one of the following ways:

INVOCATION

or

INVOCATION—REVEREND HENRY E. BESEDA, AUSTIN BRETHREN CHURCH

A written agenda typically consists of six to ten

letter-sized pages.

8. The City of Austin, at public expense, prepares written minutes of regular meetings of the City Council. Typically, if an invocation is delivered at a Council meeting the minutes will so indicate in the following manner:

INVOCATION

> The invocation was delivered by Reverend John Towery, Congregational Church of Austin

A set of written minutes typically consists of twenty to forty-five letter-sized pages.

9. Although the text of an invocation does not appear on the agenda of meetings or in the minutes of meetings, all Council meetings are taped and, therefore, the full text of an invocation appears on these tapes which are stored in the office of Austin's City Clerk. The tape of a typical City Council meeting is six to twelve hours long.

10. The invocations delivered at the beginning of City Council meetings typically consume less than one minute of time.

11. Invocations delivered at the beginning of City Council meetings are not given by, selected by, prepared or written by, reviewed by, edited by, or typed by Defendants or any other City of Austin employee or official.

12. Currently, the predominant practice followed in obtaining a person to deliver the invocation is that the Austin Council of Churches notifies the City of a local clergyman who will be available.

13. There are no restrictions on who can deliver an invocation and no person has been refused the opportunity to deliver the invocation at a City Council meeting.

14. Defendants have not received any requests from Hindus, Buddhists, Muhammadans, members of the Church of Scientology, or Atheists to present an invocation or ceremony at the beginning of City Council meetings. During the term of the current mayor there have not been any express invitations to give the invocation or ceremony extended to any of the above-mentioned groups.

15. Persons giving the invocation receive no compensation of any kind whatsoever from Defendants, the City of Austin, or the City's employees or officials.

16. Typically the invocation is announced by the Mayor in the following fashion:

"The invocation will be delivered by John Doe," at which time City Council members and most of those persons present stand for the invocation. There is no request made for those present to stand or to do anything else.

17. No person is required to stand or be present during the invocation, and every person present is

completely free to leave before or during the invocation.

18. The custom and practice of having an invocation at the beginning of City Council meetings has been followed for many years in Austin, Texas, and Defendants intend to continue this custom and practice.

19. Invocations given at the beginning of City Council meetings are typically addressed to a Supreme Being.

20. The invocations given at the beginning of City Council meetings are directed toward establishing a solemn atmosphere and serious tone for the City Council meetings.

The Petition For a Writ of Certiorari asserts that Ms. O'Hair has been ordered out of Federal courtrooms and City Council chambers because she refused to pray. Such is not the case. On January 28, 1981, at oral argument in this cause before the United States Court of Appeals for the Fifth Circuit, Ms. O'Hair repeatedly accused the Court of ordering her from the courtroom. Judge Ainsworth found it necessary, more than once, to explain to Ms. O'Hair that she had not been ordered from the courtroom, but instead, for her convenience, had been granted authorization to leave the courtroom during the opening announcement if she so desired. Similarly, Ms. O'Hair, contrary to her statements in her application for a writ of certiorari, has never been ordered to pray in or depart from a City Council meeting. The

criminal charge, referred to on page 8 of her Petition, was not made because she refused to pray or otherwise participate in the opening ceremony, but because she refused to cease disrupting a public meeting.

Summary of Argument

Respondents request that Petitioners' application for a writ of certiorari be denied for three reasons.

First, the decisions of the District Court and the United States Court of Appeals for the Fifth Circuit correctly hold that under the facts of this case, the presentation of an invocation at the opening of a city council meeting does not violate the establishment clause of the Fourteenth Amendment to the United States Constitution because such practice (1) has the clearly secular purpose of establishing a solemn atmosphere and serious tone for city council meetings, (2) has a primary effect which neither advances nor inhibits religion, and (3) avoids excessive government entanglement with religion. The facts stipulated to by Petitioners and Respondents clearly show that the invocation practice followed by the Austin City Council is directed toward establishing a solemn atmosphere and a serious tone for city council meetings. In addition, the stipulated facts establish that the invocation practice of the Austin City Council has a primary effect which neither advances nor inhibits religion, since invocations are extremely brief, are subject to being delivered by anyone, and since no person is required to participate in the invocation proceedings. Finally, the stipulated facts reveal that the invocation practice of the Austin City Council avoids excessive government entanglement with religion in that the City does not write, review, edit, or type any of the invocations and does not provide any

compensation whatsoever to anyone who delivers an invocation. Therefore, the decisions of the District Court and the United States Court of Appeals for the Fifth Circuit do not conflict with applicable decisions of this Court.

Second, the practice of having invocations at the opening of a city council meeting, under the facts of this case, does not present an important question of federal law that should be settled by this Court. Any contact between government and religion in this case is certainly *de minimus*. There is no sponsorship, financial aid to, or active involvement in, religion of a degree which transgresses the establishment clause of the Fourteenth Amendment to the United States Constitution. Therefore, under the facts of this case, no important federal question exists which should be settled by this Court.

Third, the United States Court of Appeals for the Eighth Circuit has decided the issue in this case consistent with the United States Court of Appeals for the Fifth Circuit. In addition, all other court decisions on this same matter are consistent with the decisions in this case.

Argument

I. THE DECISIONS BELOW ARE CORRECT AND DO NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The District Court and the Court of Appeals correctly held that Respondents' invocation practice does not violate the establishment clause. The Supreme Court has established a three-part test for the analysis of establishment clause claims. To be upheld, a law or practice must have a clearly secular purpose; second, must have a primary effect that neither advances nor inhibits religion; and third, must avoid excessive government entanglement with religion. *Committee for Public Education v. Nyquist,* 413 U.S. 756, 773 (1973).

Respondents' invocation practice has the clearly secular purpose of establishing a solemn atmosphere and serious tone for the City Council meetings. Fact stipulation number twenty (20) establishes that the Respondents' invocation practice is directed toward establishing a solemn atmosphere and serious tone for City Council meetings.

The invocation has a primary effect that neither advances nor inhibits religion. In this case, invocations of less than one minute's duration, which are not selected, prepared or written, reviewed, edited, or typed, by any municipal official or employee, are delivered by individuals of varying religious beliefs at the opening of City Council meetings. There is no

requirement or request made that any person stand or be present during the brief invocation, and every person present is completely free to leave before or during the invocation. No person is excluded from taking his or her turn at delivering the opening ceremony, and no person has ever been refused the opportunity to do so. In addition, there is no compensation flowing from the government to any person delivering an invocation. The described practice does not have the primary effect of advancing any religion over any other religion, does not have the primary effect of advancing religion over nonreligion, and does not inhibit religion.

Respondents' invocation practice, likewise, avoids excessive government entanglement with religion. In this case, there is no financing of religion, no administrative oversight of religion, and no governmental conditions placed on participation in the City's invocation practice. Therefore, the invocation practice in this case does not present the kind of involvement that could tip the balance toward government control of churches or toward governmental restraint on religious practices. *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970). Therefore, the invocation practice of the Austin City Council has not and will not result in political divisiveness of the kind that threatens both church and state.

The Supreme Court has never resolved the question of the validity of invocations given at the beginning of government meetings. However, two decisions of this Court have indicated *in dicta* that such practices are not objectionable. See *Zorach v. Clau-*

son, 343 U.S. 306, 312-313 (1952); and *Abington School District v. Schempp*, 374 U.S. 203, 299-300 (1963) (Brennan concurring).

Therefore, although the Supreme Court has never resolved the question presented, application of the Court's three-part test supports the conclusion that the District Court and the Court of Appeals correctly decided the merits of this case.

II. THE PRACTICE OF HAVING INVOCATIONS AT THE OPENING OF A CITY COUNCIL MEETING DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Decisions of this Court establish that the primary evils that the establishment clause was designed to protect against are: (1) sponsorship of religion by government, (2) financial aid to religion by government, and (3) active involvement of government in religion. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970). Also, this Court has made it clear that the First Amendment does not require that in every respect and all respects there shall be a separation of Church and State. *Zorach v. Clauson*, 343 U.S. 306 (1952); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976). Although the tripartite test of secular purpose, primary effect, and excessive entanglement has been developed by this Court for analyzing government actions

alleged to be in violation of the establishment clause, the Court has stated that this test is to be used as a guideline only, is not to be applied mechanically, but is to be used as an aid in determining whether the action is of such degree as to violate the establishment clause. *Tilton v. Richardson*, 403 U.S. 672 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975). In this case, the degree of government involvement with religion is clearly *de minimus* and does not result in government sponsorship of religion, government financial aid to religion, or active involvement of government in religion which will lead to a government established religion, to political divisiveness, to persecution of persons, to a degrading of religion, or to the destruction of government. *Engel v. Vitale*, 370 U.S. 421 (1962). Therefore, the decision in this case does not involve an important federal question that should be settled by this Court.

III. THE DECISIONS BELOW DO NOT CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL ON THE SAME MATTER NOR WITH THE DECISION OF A STATE COURT OF LAST RESORT.

The decisions of the District Court and the United States Court of Appeals for the Fifth Circuit are in accord with the decision rendered by the United States Court of Appeals for the Eight Circuit in *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979). Also, there are no decisions of other federal courts of appeal on the same matter which conflict with the decisions in

this case. Likewise, the decisions in this case are consistent with the following United States District Court and state court decisions:

Chambers v. Marsh, 504 F.Supp. 585 (Neb. 1980)

Colo v. Treasurer and Receiver General, ___ Mass. ___, 392 N.E. 2d 1195 (1979)

Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968)

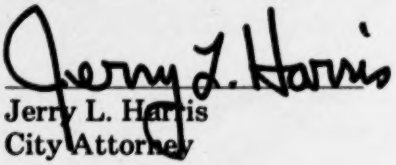
Marsa v. Wernik, 163 N.J. Super. 589, 395 A.2d 530 (Ch. Div. 1978), *aff'd per curium*, 171 N.J. Supr. 587, 410, A.2d 282 (App. Div. 1980, appeal pending)

And, there is no decision of a state court of last resort which is in conflict with the decisions in this case.

Conclusion

Therefore, for the reasons stated, Respondents respectfully request that the writ of certiorari be denied.

Respectfully Submitted,



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Certificate of Service

In accordance with Supreme Court Rules 28.3 and 28.5, I hereby certify that all parties required to be served in this cause have been served by mailing, first-class postage prepaid, six (6) true and correct copies of the foregoing Brief in Opposition, to:

Madalyn Murray O'Hair
Jon G. Murray
The American Atheist Center
P.O. Box 2117
Austin, Texas 78768

on this the 12th day of June, 1981.

Jerry L. Harris
Attorney for Respondents